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12 December 2006

VIA HAND DELIVERY

Mr. Bruce H. Burcat
Executive Director
Delaware Public Service Commission
861 Silver Lake Blvd., Ste. 100
Dover, DE 19904

Re: *PSC Docket No. 06-241*

Dear Mr. Burcat:

Enclosed please find the original and ten (10) copies of the Staff's Response to the Petition of Professors Jeremy Firestone and Willett Kempton for Rehearing and Reconsideration of Commission Order No. 7066. Copies of the Response have been served on the service list as indicated.

Respectfully submitted,


James McC. Geddes

Enclosures
JMcCG:dlb
cc: Service List (via electronic mail; w/encl.)

175997.1

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE
AND THE DELAWARE ENERGY OFFICE**

**IN THE MATTER OF INTEGRATED RESOURCE)
PLANNING FOR THE PROVISION OF STANDARD)
OFFER SERVICE BY DELMARVA POWER &)
LIGHT COMPANY UNDER 26 DEL. C. §1007(c) &)
(d): REVIEW AND APPROVAL OF THE REQUEST)
FOR PROPOSALS FOR THE CONSTRUCTION OF)
NEW GENERATION RESOURCES UNDER)
26 DEL. C. §1007(d) (Opened July 25, 2006))**

PSC DOCKET NO. 06-241

**RESPONSE OF THE STAFF OF THE DELAWARE PUBLIC SERVICE COMMISSION
IN OPPOSITION TO PETITION OF JEREMY FIRESTONE AND WILLETT
KEMPTON FOR REHEARING AND RECONSIDERATION
OF COMMISSION ORDER NO. 7066**

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December 12, 2006

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The Staff of the Delaware Public Service Commission (“Staff”), by and through Rate Counsel, hereby objects to the Petition of Jeremy Firestone and Willett Kempton for Rehearing and Reconsideration (the “Petition”), and in support thereof respectfully submits as follows:

1. Professors Firestone and Kempton made at least three attempts in this docket to convince the Commission and the Energy Office (hereafter collectively referred to as “Commission/Office”) that their proposed weighting of the various criteria set forth in the Electric Utility Retail Customer Supply Act of 2006 (the “EURCSA”) with respect to the Request for Proposals (“RFPs”) to be issued by Delmarva Power & Light Company (“Delmarva”) for Standard Offer Service (“SOS”) were appropriate and should be adopted.¹ The Commission/Office rejected their contentions. Now Professors Firestone and Kempton are back,

¹ Professors Firestone and Kempton submitted written comments on October 6, 2006; they appeared before the Commission on October 17, 2006 and presented oral argument to the Commission regarding their comments; and they submitted written objections to the Commission’s draft of Order No. 7066. Mr. Kempton also appeared at the October 31, 2006 Commission/Energy Office meeting to press their objections to the entry of the proposed Order. Thus, they have actually had four opportunities to express their position.

contending that the Commission/Office should reconsider its decision, making the same substantive arguments that were rejected the first time, but seemingly claiming (without using the words) that they were somehow denied due process. First, they complain about the limited time for them to comment on the redlined RFP filed by the Independent Consultant shortly before the October 17, 2006 Commission/Office meeting. Second, Professors Firestone and Kempton assert that the Commission/Office should reconsider its entry of Order No. 7066 because the Commission/Office did not specifically address particular comments that they made in their October 30, 2006 submission (Petition, paras. 25-29). Next, they argue that Order No. 7066 does not accurately reflect the votes that the Commission/Office took at the October 17, 2006 deliberations. (Petition, paras. 30-32). Finally, they contend that Order No. 7066 misstates their position with respect to the assignment of points to the site development criterion. (Petition, paras. 33-34). As Staff will demonstrate, none of Professors Firestone's and Willett's complaints warrants the Commission in granting reconsideration or rehearing.

A. All of the Participants Were Working Under The Same Time Constraints.

2. Professors Firestone and Kempton complain about the short amount of time that they had to respond to the redlined RFP that the Independent Consultant filed shortly before the October 17, 2006 Commission/Office meeting (and further complain that their comments thereon were not placed on the Commission website until after that meeting). But, as Professors Firestone and Kempton are aware, there was no requirement under the procedural schedule approved in the case that the Independent Consultant file any redlined RFP. That was done as a convenience to the participants. Furthermore, Professors Firestone and Kempton had submitted written comments on at least two prior occasions and presented oral argument at the October 17,

2006 Commission/Office meeting. Their comments were heard and considered by the Commission/Office in its determination of the issues ultimately decided in Order No. 7066.

3. To the extent that Professors Firestone and Kempton are asserting that they were denied due process, they were not. The General Assembly set forth the deadlines within which the Commission/Office was forced to work in the EURCSA. All participants in the RFP process – including Delmarva, Staff, the DPA and all of the other interested parties – were subject to the same constraints. The Commission/Office did not deny any participant the opportunity to be heard. There was, quite simply, no denial of due process.

B. The Commission/Office Is Not Required to Specifically Address Each and Every Comment or Objection Raised By Each and Every Party.

4. Professors Firestone and Kempton contend that the Commission/Office should reconsider Order No. 7066 because that Order failed to address each and every one of their comments. They seem to believe that an administrative agency must specifically accept or reject every contention advanced by a participant to a proceeding. But judges in courts of law need not do that, and neither do administrative agencies.

5. This docket resembled a rulemaking proceeding in that notice of the docket was given and a proposed RFP was made available; interested parties were invited to submit comments on the proposed RFP; and the Commission/Office made a determination as to the elements to be included in the RFP. It has long been held that “[t]here is no requirement for [an agency] to discuss every fact or opinion contained in the public comments.” *State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874, 885 (4th Cir. 1983), *cert. denied sub nom. South Carolina v. Block*, 465 U.S. 1080, 104 S.Ct. 1444, 79 L.Ed. 2d 764 (1984); *see also Consumers’ Union of United States, Inc. v. Consumer Product Safety Commission*, 491 F.2d 810, 812 (2d Cir. 1974) (formal opinion specifically covering all rejected alternatives not required in informal

rulemaking proceeding); *GTE Sylvania Inc. v. Consumer Product Safety Commission*, 404 F. Supp. 352, 368 n.70 (D. Del. 1975) (in informal administrative proceeding, it is not mandatory that an agency's substantially contemporaneous writing relied upon and adopted by the Commission specifically reject every contention). Rather, the agency's written decision must simply enable a reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did." *State of South Carolina, supra* at 886 (citations omitted).

6. The Petition cites no authority for its contention that the Commission/Office was required to specifically address and reject each and every comment that Professors Firestone and Willett proffered. And they cannot, because the law is exactly the opposite. In Order No. 7066, the Commission/Office set forth the policy issues that the Commission/Office considered in making its determinations and explained why the Commission/Office made particular decisions on those policy issues. The law requires no more. The Petition should be denied on this ground as well.

C. The Order Is Not Inconsistent With the Transcript of the October 17 Deliberations, But Even If It Was, It Is the Commission/Office's Written Opinion That Controls.

7. The Petition's next assignment of error is that Order No. 7066 is inconsistent with what the Commission/Office stated on the record during their deliberations. As an example, they claim that the Commission/Office took only one vote, but that Order No. 7066 reflects several votes taken. The Commission/Office *did* indeed vote to adopt the Independent Consultant's Report and Recommendations for the reasons that were set forth in that Report and Recommendations, but then separately addressed various individual issues at the request of

several of the parties. Thus, the Commission/Office *did* vote more than once, and the Petition is simply wrong on that account.

8. As for Order No. 7066 reflecting separate votes on issues that the Commission/Office did not consider separately, we do not hear Professors Firestone and Kempton to say that the Commission/Office did *not* vote to adopt the Independent Consultant's Report and Recommendations for the reasons set forth by the Independent Consultant, just that the Commission/Office did not do so for each and every one of those issues. This, Staff submits, is a distinction without a difference, and does not render the Order inconsistent with the Commission's deliberations. The Commission adopted the Independent Consultant's Report and Recommendations on those issues, and Order No. 7066 so reflects. The Commission/Office believed that it made for a cleaner Order to lay the issues out separately. If anything, this furthers judicial review rather than hinders it.

9. Furthermore, there is no requirement that the final Order track chronologically with Commission/Office's deliberations. The general rule is that agency decisions (and the bases therefore) are freely changeable up to the point of announcement. 2 Am. Jur. 2d, *Administrative Law*, §373 (2004). In *LO Shippers Action Committee v. Interstate Commerce Commission*, 857 F.2d 802 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia reiterated this general rule in rejecting an appellant's position that the vote at the public meeting was the agency's actual decision, stating that "the [agency's] formal opinion is its decision because the commissioners retained full authority to approve, disapprove or modify it until published." *Id.* at 805. In *PLMRS Narrowband Corp. v. Federal Communications Commission*, 182 F.3d 995 (D.C. Cir. 1999), that Court further explained:

It is fundamental that "[a]gency opinions, like judicial opinions, speak for themselves." *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C.

Cir. 1994). Rendered at the conclusion of all the agency's processes and deliberations, they represent the agency's final considered judgment upon matters of policy the [Legislature] has entrusted to it. Accordingly, "[w]here an agency has issued a formal opinion or a written statement of its reasons for acting, transcripts of agency deliberations at Sunshine Act meetings should not routinely be used to impeach that written opinion." *Kansas State Network v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983).

Id. at 1001. Thus, where the Commission has acted in a written order, the transcript of its deliberations cannot be used (except in extreme circumstances not present here) to impeach its written order. The Petition therefore must be denied on this basis.

D. All of Professors Firestone's and Kempton's Comments Were Addressed.

10. In their initial comments, Professors Firestone and Kempton attacked the Independent Consultants' Report's proposed weighting of price stability and reductions in environmental impacts, contending that the Report weighted price too heavily at the expense of price stability and reduction in environmental benefits. (Initial Firestone/Kempton Comments, pages 2-4). In their comments on the redlined RFP, they said the same thing. The Commission specifically addressed this issue in Order No. 7066. (See, e.g., paras. 43, 165, 168-173).

11. In Professors Firestone's and Kempton's initial comments, they complained that the Report gave short shrift to the possibility of carbon or Btu taxes and would pass such costs on to ratepayers. (Initial Firestone/Kempton Comments, page 2). In their comments on the redlined RFP, they made the same point. The Commission specifically addressed this issue in Order No. 7066. (See paras. 215-220).

12. In Green Delaware's initial comments, Green Delaware asserted that the evaluation of bids should be entirely public in order to ensure the integrity of the process and to assure the public that its interest was being served. Green Delaware contended that the Commission/Office's consultant and Delmarva should not work together "behind closed doors"

to “reach a consensus.” (Green Delaware Initial Comments at 5). In their comments on the redlined RFP, Professors Firestone and Kempton essentially make the same argument. While Order No. 7066 did not address this specific concern, Rule 11 of the Commission’s Rules of Practice and Procedure, “Submission of Confidential, Proprietary, and Privileged Material” (effective May 10, 1999), provides for parties to submit confidential and proprietary information to the Commission and requires Staff to observe the confidentiality of such information:

11.(f). Non-public information shall not be disclosed by the Commission, its Staff, the Division of the Public Advocate, and their consultants and any party to a proprietary agreement and its consultants except as authorized by law.

13. In their comments on the redlined RFP Professors Firestone and Kempton discuss confidentiality, but their comments make no point other than to clarify Staff’s position of two versions of the evaluation report. Their discussion regarding the Commission/Office’s control of capacity factor adjustments, although substantially correct, is irrelevant, as Professors Firestone and Kempton have known (or should have known) from the inception of this process that, pursuant to the EURCSA, control of the entire process rests ultimately with the four state agencies identified in the EURCSA – that point was made at the August 18, 2006 meeting.

14. Thus, there is nothing in Professors Firestone’s and Kempton’s comments on the redlined RFP that has not already been addressed – either in the Independent Consultant’s Report (which the Commission/Office thoroughly reviewed in Order No. 7066), in Order No. 7066 itself, or in the proceedings leading up to the issuance of Order No. 7066. Consequently, their contention provides no basis for the Commission/Office to reconsider Order No. 7066.

E. The Misstatement of Professors Firestone's and Kempton's Position on the Weighting of Site Development Is Immaterial, As It Would Not Have Changed the Commission/Office's Determination on This Issue.

15. Finally, Professors Firestone and Kempton complain that Order No. 7066 misstates their position regarding the appropriate number of points to be allocated to the site development criterion. Staff acknowledges that Order No. 7066 does not set forth Professors Firestone's and Kempton's position on this issue, and that the Order does misstate the fact that they did object to the weight assigned to this criterion. However, Staff respectfully submits that the addition of their position on this issue to the Order would not have changed the Commission/Office's determination on the issue. The Commission/Office adopted the Independent Consultant's Report in its entirety, and then addressed individual issues as requested by parties seeking more discussion of those individual issues. No party at the October 17 meeting requested the Commission to specifically address the appropriate number of points allocated to the site development criterion, although any party could have done so. (Professors Firestone and Kempton know this, because they requested the Commission to address individual issues). In light of the fact that Professors Firestone and Kempton raised their particular objections in writing twice prior to the Commission/Office's October 17, 2006 meeting, it is fair to say that the Commission/Office did not find those comments convincing or persuasive, and thus merely including the objection in the Order would not have changed the Commission/Office's decision on the issue. This argument therefore provides no basis for the Commission/Office to grant reconsideration of Order No. 7066.

CONCLUSION

18. **WHEREFORE**, Staff respectfully submits that the Petition should be denied.

ASHBY & GEDDES

A handwritten signature in black ink, appearing to read 'James McC. Geddes', is written over a horizontal line.

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Dated: December 12, 2006
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